

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs November 20, 2008

**STATE OF TENNESSEE v. TIMOTHY MCGUIRE WOODS**

**Appeal from the Criminal Court for Davidson County**  
**No. 2007-A-794     Monte Watkins, Judge**

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**No. M2008-00103-CCA-R3-CD - Filed December 19, 2008**

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The Defendant, Timothy McGuire Woods, pleaded guilty in the Davidson County Criminal Court to misdemeanor theft. Under the plea agreement, he received a sentence of eleven months and twenty-nine days in the county jail, and his sentence was probated. Following a hearing, the trial court ordered the Defendant to pay restitution to the victim in the amount of \$2,250.55. On appeal, the Defendant argues that the proof did not sufficiently establish the amount of restitution awarded and, furthermore, that the trial court did not consider the Defendant's financial resources or ability to pay as required by statute. Because we conclude that the trial court made inadequate findings in assessing restitution, we remand for reconsideration of the restitution award based upon the required findings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed,  
Remanded**

DAVID H. WELLES, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and NORMA MCGEE OGLE, JJ., joined.

Emma Rae Tennent, Assistant Public Defender, Nashville, Tennessee, for the appellant, Timothy McGuire Woods.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence Lutz, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Roger Moore, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### Factual Background

A Davidson County grand jury charged the Defendant with theft of property occurring on April 8, 2003, valued at more than \$500.00 but less than \$1,000.00, a Class E felony. See Tenn. Code Ann. §§ 39-17-103, -105. On October 16, 2007, the Defendant entered a “best interest” plea to theft of property valued at \$500.00 or less, a Class A misdemeanor. See id. Pursuant to the terms of the plea agreement, the Defendant received an eleven-month-and-twenty-nine-day sentence to be served on supervised probation.

At the guilty plea hearing, the prosecutor recited the proof the State would have introduced in support of the theft charge had the case gone to trial:

The testimony would be from Mr. Barry Walker, who, basically, works down at Marathon Village on Clinton Street. On April the 8th, about one-fifteen he observed, basically, a couple of individuals loading some bricks. And these are, from what I gather, not restored, but reclaimed, bricks from old buildings and whatnot. And he would say that he saw [the Defendant] taking some of the bricks, confronted him, and [the Defendant] said he was sorry for taking them, that he didn’t, basically, know that they were valuable, or whatever, and that he would bring back ones that he had taken on a previous trip, but did not do so. And the bricks did have value, that to be determined, but for purposes of the plea, less than five hundred dollars. Although, again, just to clarify that, the [c]ourt may find that they’re worth more than that.

Thereafter, on November 2, 2007, the trial court conducted an evidentiary hearing to determine the appropriate amount of restitution to award the victim.

Barry Walker, a developer, testified that he was restoring Marathon Village and the factory downtown, an old building built from 1881-1912. Regarding the stolen bricks, he stated that the bricks were “very rare. They were built in 1840. And they’re different. They’re a handmade type brick, and they’ve got a different look to them. They’re very much in demand.”

When asked how many bricks were stolen, Mr. Walker replied, “I had a total of nine thousand bricks stolen, we’ve counted now. I know that this gentleman had taken a lot of them, between him and whoever else. And we don’t know exactly if it was eight thousand, six thousand. But, I had nine thousand bricks missing.” Mr. Walker stated that “a big majority was taken at one time, but, then, it was—people had spotted them with—over time. Over, like, a week’s period. Come in late at night.” He further asserted that the stolen handmade bricks sold for around one dollar a piece.

On cross-examination, Mr. Walker testified that he observed the Defendant loading bricks into a truck on only one occasion. On another occasion, Mr. Walker saw the Defendant’s truck, but he did not personally see the Defendant.

Mr. Walker relayed that, after the theft, the bricks were moved inside to an enclosed area. At the time of this crime, the bricks were stored beside an office building, which was an “open area[,] . . . half-fenced in area, with ‘No Trespassing’ signs all around it.” He confirmed that these bricks had been left outside for “a year or two[.]”

Mr. Walker testified that, one day, he confronted the Defendant about taking the bricks and that the Defendant admitted to taking about fifteen hundred bricks. According to Mr. Walker, he told the Defendant he would not prosecute if the Defendant returned the bricks. He attempted to contact the Defendant to no avail; the bricks were never returned.

The Defendant testified that, at the time of the incident, he worked at Bridgestone Firestone. The Defendant was constructing a “little pad out between [his] patio and [his] swimming pool.” According to the Defendant, his boss informed him that there were bricks in a vacant lot by his boss’s aunt’s house.

The Defendant admitted that he went in his truck to the lot and took bricks on three occasions. When asked how many total bricks he took from the lot, he responded that, on April 8, he took 69 bricks and that he had an additional 120 bricks at home. He denied ever telling Mr. Walker that he stole fifteen hundred bricks. He did admit to Mr. Walker that he had been to the lot before.

According to the Defendant, Mr. Walker informed the Defendant that he could pay him twelve hundred dollars that day or return the bricks. The Defendant did not believe that he had twelve hundred dollars worth of bricks and agreed to return them to Mr. Walker. The Defendant averred that he did return the bricks approximately ten days later. According to the Defendant, he was late to meet Mr. Walker because of car problems, but he did “put them right back where [he] got them from.” The Defendant testified that there were not any “No Trespassing” signs in the area.

At the conclusion of the hearing, defense counsel requested a document providing that the bricks were worth one dollar a piece. After this request, the following colloquy ensued:

[DEFENSE COUNSEL]: . . . I don’t think that there is any understanding that he’s the gentleman who stole nine thousand bricks. But there seems to be no definition here of what he stole. And, you know, so the question comes down to, for you, to determine how many bricks he stole.

THE COURT: Well, to determine the restitution.

[DEFENSE COUNSEL]: Correct. And that would be based upon how many bricks were missing due to this gentlemen’s theft and whether or not any bricks were returned. Those are the two questions appearing to me.

THE COURT: I can make that determination. I don't have any problem with that.

Then, the State submitted that, at the very least, the Defendant owed \$1,200.00 to the victim, and defense counsel indicated that the Defendant would not dispute such an amount. The prosecutor further stated that, "[i]n all truthfulness it would[,] probably, be a lot more [than \$1,200.00], but that will be for Your Honor to determine." The trial court took the matter under advisement, responding, "And I'll be happy to make the determination. And I will do so, as soon as I get some more information." The hearing was concluded.

By order dated December 12, 2007, the trial court ordered the Defendant to pay \$2,250.55,<sup>1</sup> as a condition of his probation. The order provides, in pertinent part, as follows: "The amount of restitution was taken under advisement pending proof of the value of the stolen property. Subsequently, the State filed on November 13, 2007 an invoice from the victim in the amount of \$2,250.55. Therefore, the [c]ourt sets restitution in the amount of \$2,250.55 . . . ." This appeal followed.

### Analysis

The Defendant challenges the trial court's order regarding the payment of restitution, arguing both that the proof was insufficient to show that the victim suffered a total loss of \$2,250.55 and that, even if proven, the trial court failed to consider the financial resources and future ability of the Defendant to pay the restitution amount, findings required by Tennessee Code Annotated section 40-35-304(d). The State submits that the record supports the restitution award, but concedes that the trial court did not make the required statutory findings. The State thus asserts that this case must be remanded for further findings.

The record reflects that the restitution amount of \$2,250.55 was based upon the invoice provided by the victim subsequent to the evidentiary hearing. The invoice indicates that Marathon Village made a purchase of two thousand handmade bricks at a cost of \$1.03 a piece with the addition of sales tax, resulting in a total amount of \$2,250.55.

When a defendant challenges the validity and amount of restitution, this Court must conduct a de novo review of both the amount of restitution ordered and the method by which it was determined. State v. Johnson, 968 S.W.2d 883, 884 (Tenn. Crim. App. 1997) (citing Tenn. Code Ann. § 40-35-401(d) (1990); State v. Frank Stewart, No. 01-C-019007CC00161, 1991 WL 8520, at \*1 (Tenn. Crim. App., Nashville, Jan. 31, 1991)). The trial court is entitled to a presumption of correctness. Tenn. Code Ann. § 40-35-401(d).

A trial court, in conjunction with a probated sentence, may order a defendant to make restitution to the victim of the offense. See Tenn. Code Ann. § 40-35-304(a). "The purpose of restitution is not only to compensate the victim but also to punish and rehabilitate the guilty."

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<sup>1</sup> While the victim is noted on the judgment form, the amount of restitution ordered is not.

Johnson, 968 S.W.2d at 885. The statute that governs restitution as a condition of probation provides, in pertinent part, as follows:

(b) Whenever the court believes that restitution may be proper or the victim of the offense or the district attorney general requests, the court shall order the presentence service officer to include in the presentence report<sup>2</sup> documentation regarding the nature and amount of the victim's pecuniary loss.

(c) The court shall specify at the time of the sentencing hearing the amount and time of payment or other restitution to the victim and may permit payment or performance in installments. The court may not establish a payment or performance schedule extending beyond the statutory maximum term of probation supervision that could have been imposed for the offense.

(d) In determining the amount and method of payment or other restitution, the court shall consider the financial resources and future ability of the defendant to pay or perform.

(e) For the purposes of this section, "pecuniary loss" means:

(1) All special damages, but not general damages, as substantiated by evidence in the record or as agreed to by the defendant; and

(2) Reasonable out-of-pocket expenses incurred by the victim resulting from the filing of charges or cooperating in the investigation and prosecution of the offense; provided, that payment of special prosecutors shall not be considered an out-of-pocket expense.

Tenn. Code Ann. § 40-35-304(b)-(e).

Special damages are those which are "the actual, but not the necessary, result of the injury complained of, and which in fact follow it as a natural and proximate consequence." State v. Lewis, 917 S.W.2d 251, 255 (Tenn. Crim. App. 1995) (quoting Black's Law Dictionary 392 (6th ed. 1990)). General damages are those which are "the necessary and immediate consequence of the wrong." Id. (quoting Webster's New International Dictionary 664 (2d ed. 1957)). It is unnecessary for the sentencing court to determine restitution in accordance with the strict rules of damages applied in civil cases. Johnson, 968 S.W.2d at 887.

The sum of restitution ordered must be reasonable and does not have to equal the precise pecuniary loss. State v. Smith, 898 S.W.2d 742, 747 (Tenn. Crim. App. 1994). There is no set formula. Johnson, 968 S.W.2d at 886. The sentencing court must consider not only the victim's loss

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<sup>2</sup> It appears that no presentence report was ordered in this case.

but also the financial resources and future ability of the defendant to pay. Tenn. Code Ann. § 40-35-304(d); State v. Bottoms, 87 S.W.3d 95, 108 (Tenn. Crim. App. 2001). In ordering restitution, the trial court shall specify the amount and time of payment and may permit payment or performance of restitution in installments. Tenn. Code Ann. § 40-35-304(c). The court may not, however, establish a payment or schedule extending beyond the expiration of the sentence. Tenn. Code Ann. § 40-35-304(g)(2). If the defendant, victim, or district attorney petitions the trial court, it may hold a hearing and, if appropriate, waive, adjust, or modify its order regarding restitution. Tenn. Code Ann. § 40-35-304(f). Further, any unpaid portion of the restitution may be converted to a civil judgment. Tenn. Code Ann. § 40-35-304(h)(1); Bottoms, 87 S.W.3d at 108.

On appeal, the Defendant argues that the evidence presented was insufficient to establish the amount of the victim's loss and that the trial court did not make the findings required by Tennessee Code Annotated section 40-35-304(d). In theft convictions, the sentencing court may order restitution pursuant to Code section 40-20-116(a)<sup>3</sup> and as a condition of probation. See State v. Patricia White, No. W2003-00751-CCA-R3-CD, 2004WL 2326708, at \*23 (Tenn. Crim. App., Jackson, Oct. 15, 2004). Because, in this case, restitution was imposed solely as a condition of probation, the section 40-35-304(d) considerations about financial resources and future ability to pay determine the amount and method of payment of appropriate restitution. Id. We agree with the Defendant that the record in this case contains inadequate findings as to the amount of the victim's loss and the required section 40-35-304(d) findings. A remand is required.

The trial court did not determine a specific amount at the hearing but took the matter under advisement to await further documentation. The restitution award was based upon the invoice provided by the victim following the evidentiary hearing, which showed that Marathon Village made a purchase of two thousand handmade bricks at a cost of \$1.03 a piece with the addition of sales tax, resulting in a total amount of \$2,250.55. However, there is no proof that this amount accurately reflected the amount of loss suffered by the victim. The victim testified that nine thousand bricks were stolen from his property. There was testimony that the Defendant admitted to stealing fifteen hundred bricks. According to the Defendant, he took only 69 bricks on one occasion and had an additional 120 bricks at his home. The Defendant also testified that he returned the bricks. The trial court made no findings as to how the amount of restitution awarded related to the Defendant's theft or, put another way, reflected the actual loss suffered by the victim as a result of the Defendant's crime.

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<sup>3</sup> Section 40-20-116(a) provides as follows:

Whenever a felon is convicted of stealing or feloniously taking or receiving property, or defrauding another of property, the jury shall ascertain the value of the property, if not previously restored to the owner, and the court shall, thereupon, order the restitution of the property, and, in case this cannot be done, that the party aggrieved recover the value assessed against the prisoner, for which execution may issue as in other cases.

Furthermore, the trial court did not consider the Defendant's financial resources and his future ability to pay or perform as required by statute. See Tenn. Code Ann. § 40-35-304(d). The record established that the Defendant was employed at Bridgestone Firestone at the time of the offense, but no mention was made of his earnings.

Because of the uncertainty as to the victim's loss and the additional considerations in setting the total restitution amount, we cannot conclude that the restitution award was proper. Upon remand, the trial court should make specific findings pursuant to Tennessee Code Annotated section 40-35-304(d) regarding the Defendant's financial resources and ability to pay. Moreover, the trial court must set forth its method for calculating the amount of the loss as a part of the record.

### **Conclusion**

After a review of the record, we remand the restitution award for additional determinations concerning the amount of the victim's loss and the Defendant's financial resources and future ability to pay.

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DAVID H. WELLES, JUDGE